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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROSS ADAM WINKLER,

Defendant and Appellant.

D076122

(Super. Ct. No. SCE382021)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed in part, sentence vacated and remanded with directions.

Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Mary Katherine Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

Confusion in the handling of an amended information resulted in the failure to arraign the defendant on the information, which had added an

alleged serious felony prior conviction (Pen. Code,¹ § 667, subd. (a)(1)) to the pleadings. Further confusion occurred at sentencing. The sentence included a term for the prior; however, the defendant had not yet admitted the truth of it.²

We will find the current sentence unauthorized because of the failure of the court to obtain the defendant's admission. We will vacate the sentence and remand the case to the trial court with directions to arraign the defendant on the amended information and to conduct such proceedings as may be appropriate to determine the truth of the alleged serious felony prior. Once that issue is resolved, the court shall sentence the defendant accordingly.

PROCEDURAL BACKGROUND

A jury convicted Ross Adam Winkler of assault with a deadly weapon (§ 245, subd. (a)(1)) and found true that he inflicted great bodily injury (§ 12022.7, subd. (a)). He was also found guilty of battery with serious bodily injury (§ 243, subd. (d)). The court sentenced Winkler to a term of 16 years, consisting of the upper term of four years for assault with a deadly weapon, doubled because of his strike prior, plus three years for the great bodily injury enhancement and five years for the serious felony prior under section 667, subdivision (a)(1), which was not alleged in the original information, but was included in the amended information, although the record now shows Winkler did not admit the serious felony prior.

Winkler filed a timely notice of appeal.

¹ All further statutory references are to the Penal Code.

² The same prior conviction was alleged in the original and amended informations as a strike prior (§ 667, subds. (b)-(i)). The defendant admitted the truth of the prior, which was alleged as a strike.

DISCUSSION

A. Background

The original information alleged one strike prior, which is based on the same conviction as in dispute but did not allege a serious felony prior. During the pretrial proceedings, the prosecutor filed an amended information, which did allege a section 667, subdivision (a)(1) prior. At that time, the court was conducting a closed hearing of Winkler's request to change counsel. Later, the court suspended proceedings under section 1368. Winkler was not arraigned on the amended information, although it had been formally filed with the court.

The court and parties returned to consideration of the amended information while the jury was deliberating. Defense counsel said Winkler was prepared to admit both the strike prior and the serious felony prior and waived jury trial on the priors. Again, there was confusion as to whether Winkler had been arraigned on the amended information

Before the court could arraign Winkler on the new information, defense counsel requested a delay to confer with a supervisor.

It appears the parties never got back to the admission of the prior until sentencing. There, the trial court concluded that Winkler had notice of the allegation and had admitted the strike prior, which was the same conviction in both instances and proceeded to sentencing.

B. Analysis

The parties agree the sentence on the five-year prior is unauthorized because it was not admitted by Winkler. They disagree on the remedy. Winkler contends we should simply vacate the five-year term and affirm as modified. The People argue the prior was properly alleged in the amended information that was filed with the court before trial and the defense was

aware of the allegation and agreed to admit the priors. The People reason that the proper remedy would be to remand and allow the trial court to properly adjudicate the prior. We think the People have the better argument.

Winkler relies primarily on an opinion from Division Two of this court. Specifically, he contends the opinion in *People v. Nguyen* (2017) 18 Cal.App.5th 260 (*Nguyen*) is controlling on this case. We believe *Nguyen* is distinguishable from the procedural issue presented in this case.

In *Nguyen*, the trial court sentenced on a five-year prior that had never been alleged. The fact of the conviction was alleged but not the legal effect. The court reasoned the allegation of the conviction as a strike, but not as a serious felony prior indicated a charging decision not to pursue the latter prior. (*Nguyen, supra*, 18 Cal.App.5th at p. 267.) The court found the prior had not been alleged or admitted as required by section 1170.12. The court determined, under the facts of that case, the remedy should be to strike the prior and modify the sentence accordingly.

A similar result was reached in *People v. Haskins* (1992) 4 Cal.App.4th 1434, 1440. Once again, the serious felony prior was never alleged. Thus, the sentence was not authorized, and the court found it was not appropriate to remand to address an allegation that was never made.

In the present case, the amended information was filed without objection. The defense had knowledge it pleaded a serious felony prior, waived jury trial on the prior, and was prepared to admit it. Only the continuing procedural confusion of all the parties and the court prevented proper resolution of the allegation. In such case, we believe the appropriate remedy is to remand with directions to arraign Winkler on the amended information and to adjudicate the prior appropriately. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386.)

C. The Prison Prior

During the sentencing hearing, the court imposed a one-year term for the prison prior (§ 667.5, subd. (b)) but stayed the term. Since that time, Senate Bill No. 136 changed the definition of prison priors. The prior in this case is no longer valid. We will direct the court on remand to strike the prison prior and to amend the abstract of judgment accordingly.

DISPOSITION

The sentence is vacated, and the case remanded to the trial court for resentencing. The court is directed to strike the prison prior (§ 667.5, subd. (b)). The court is further directed to arraign Winkler on the amended information and to adjudicate the validity of the serious felony prior (§ 667, subd. (a)(1)). Thereafter, the court shall resentence Winkler accordingly. In all other respects, the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.